

now-amended claims and the discussion of the prior art presented below.

Applicants first note that Claims 35 and 39 have been cancelled, without prejudice, because the claimed step is implied by the existing word "continuously" already present within the independent claims.

Applicants also note that no new matter has been added. New Claims 66-68 find support at page 37 of the specification as originally filed. New Claim 69 finds support at page 35 of the specification. New Claim 70 finds support at page 10. New Claims 71-74 find support at pages 31-32 of the specification and in FIGURE 22. New Claims 75-77 find support in FIGURE 28, for example.

### **The § 103 Rejections**

As noted by the Examiner, U.S. Patent No. 6,350,483 to Ahad et al. (Ahad) fails to disclose a method for manufacturing two or more different food products, such as peanut butter and jelly. Instead, Ahad is directed to manufacturing "multi-colored and/or multiflavored food products, especially cheese slices" (col. 2, lines 63-64). While Ahad mentions that its apparatus and method is adaptable to different food products, including ice cream, margarine, peanut butter, and jelly (col. 8, lines 29-38), there is no teaching that any single food portion may consist of two *different* food products, such as peanut butter *and* jelly, or a laminate combination, as recited in (e.g.) Claim 14.

Ahad teaches providing the food product with "a minimum inhibit substantial mixing viscosity" that inhibits mixing between two or more food streams (col. 10, lines 46-50; emphasis

added). If different food streams contained different food items (as opposed to the same food item with simply a different color or flavor added), then different viscosities would need to be selected, but Ahad does not mention this. Accordingly, it is not a merely obvious design choice for a person of ordinary skill in the art to modify Ahad in a manner which allows the provision of a food portion that has two or more different food items, as claimed.

Ahad also discloses a horizontal form and fill machine (see FIGURE 7 of Ahad), as opposed to the vertical form and fill machine as now claimed. With Ahad and such other horizontal machines, the "[food] streams spread out laterally within the film tube 154 due to the force of gravity such that the width of each stream increases while the height of each stream decreases" (Ahad, col. 10, lines 12-15). In contrast, the vertical form and fill machines of the present invention use a positive displacement pump and flattening belts, including portion/flow control mechanisms, to form the laminated slice with combined food items according to the present invention. Clearly there is no disclosure in Ahad teaching or suggesting the portion control method and/or mechanisms disclosed in Claims 1, 21, 23 and 66-68 and/or automatically tying portion control to extrusion speed (e.g., as recited in Claim 1, "a portion control method that varies the extrusion speed based on an amount of the food portion present"). Ahad only vaguely references an "automatic controller" (columns 9, 12) without providing any details. Sensors such as bubble controls (Claim 69) are not as reliable with horizontal form and fill machines: because the food product spreads horizontally rather than vertically, the "upper limit" of the bubble control sensor is not engaged, disallowing control over the food product stream amount.

With regard to Claims 18-20, vertical form and fill machines, now recited in the

independent claims, have a significant speed advantage over horizontal machines. This is because extrusion, enclosure within a flexible film and sealing occur substantially simultaneously with a vertical machine, and there is no need to "wait" for the product to flow horizontally before wrapping and sealing, as with horizontal machines such as Ahad. Ahad teaches speeds of 50-70 slices/minute (col. 11, lines 27-29; col. 12, line 15). The Examiner finds that Ahad discloses speeds of 680 slices/minute, but this is for an 8-lane machine (see columns 14-15), and only applies to the slice divider portion of the machinery in any event.

Vertical form and fill machines also provide the inherent advantage of being more efficient at excluding air pockets and air bubbles from the slices thus formed, as Applicants have learned from long practice. With a vertical machine, the food items are wrapped in the film upon insertion, whereas with a horizontal machine as shown in Ahad the food items are exposed to the ambient air upon deposition onto the support surface.

Applicants note that Ahad certainly says nothing about the viscosity ranges set forth in Claim 6 (viscosity), and the Examiner admits that Brna is also silent on this point. Kratochvil does not disclose this, either (Office Action, p. 7).<sup>1</sup> Nor is there any disclosure in Ahad concerning water activity of differing food items, as recited in Claims 2, 7 and 8. Also, there is no teaching or suggestion to combine Ahad, Brna and Kratochvil as indicated. In re Fine, 837 F.2d 1071 (Fed. Cir. 1988) (teaching to combine required for obviousness rejection).

Claims 14 and 16, reciting the use of divider plates, are not obvious in light of the cited

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<sup>1</sup> Applicants note that there may be a typographical error, as Kratochvil is said to alternatively disclose a viscosity of "9900" and "900" (id.).

prior art. Ahad mentions only viscosity control in order to inhibit mixing between two or more product streams. The present invention maintains physically separate product streams using one or more divider plates, which is a more reliable method of ensuring product separation than viscosity (which changes with temperature fluctuations, for example). FIGURE 11 of Ahad discloses a mechanism prone to occlusion, particularly when attempting to package products with relatively high viscosity such as peanut butter.

New Claims 71-74 recite the use of a portion control method that varies extrusion speed based on the amount of food portion present, and that allows adjustment of relative amounts of the food items within the food portion, using for example a biased divider plate (see pages 31-32 and FIGURE 22 of the specification). Changing viscosities (occurring based on changing temperature, for example) of opposing product laminates, for example, may require adjustment to fine-tune the fill rates of the laminates relative to each other. Ahad fails to disclose a suitable device or process for accomplishing such an objective.

New Claims 75-76, regarding chilling the product-filled film and flattening the film, are not disclosed in Ahad, either, which uses deposition and gravity effects to provide a product thickness.

In addition, there is no discussion in the Office Action of any disclosure of the specific food formulations for nut butter/jelly combinations, or the hardness therefor, as recited in Claims 9-13 and 30-31. The surprising result discussed in the specification (pages 10 and 41) that nut butter added substantially after the mixing step and prior to extrusion avoids the appearance of an unpumpable grainy mass with separated oil, is also now claimed (Claim 70).

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DOCKET NO. 3248**

For the foregoing reasons, Applicants respectfully suggest that the pending claims are patentable over the cited prior art of record and requests an allowance thereof. If the next written communication is intended to be other than a notice of allowance of the claims, Applicants request that the undersigned be contacted to discuss this case prior to the mailing of such communication.

Respectfully submitted,



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